

BRB No. 97-0761 BLA

ARTHUR THIRWAY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (96-BLA-0832) of Administrative Law Judge Robert D. Kaplan denying benefits on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge, applying the regulations at 20 C.F.R. Part 718, credited the miner with three and three-quarter years of coal mine employment and found that claimant established the existence of pneumoconiosis pursuant

¹ Claimant is Arthur Thirway, the miner, who filed his present claim for benefits on September 23, 1994. Director's Exhibit 1. Claimant's previous claims filed on September 27, 1978 and April 10, 1985 were finally denied on April 9, 1979 and July 25, 1985, respectively. Director's Exhibits 23, 24. Claimant's June 13, 1989 claim was finally denied by the Benefits Review Board on June 14, 1993. Director's Exhibits 24, 69.

to 20 C.F.R. §718.202(a)(1) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 4, 8, 15. However, the administrative law judge found that claimant failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 9-10, 15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b). Claimant's Brief at 2-7. The Director, Office of Workers' Compensation Programs, responds urging affirmance, or, alternatively, remand.² Director's Brief at 3-7.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² We affirm the administrative law judge's findings that the evidence submitted with this claim establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total respiratory disability pursuant to Section 718.204(c) inasmuch as they are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As the Director contends, claimant fails to challenge the administrative law judge's finding that claimant did not prove that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). We affirm that finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).³ Since this is an essential element of entitlement, we also affirm the administrative law judge's decision denying benefits. Hence, we need not address claimant's arguments concerning the administrative law judge's finding at Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

³ In any event, the administrative law judge's finding is supported by substantial evidence. In considering the new evidence which is supportive of claimant's burden at Section 718.203(c), the administrative law judge permissibly discredited the opinions of Drs. Kraynak and Kruk inasmuch as they are based on inaccurate coal mine employment histories. Decision and Order at 9; see *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985). Similarly, in his previous Decision and Order, the administrative law judge permissibly discredited the earlier medical opinion of Dr. Kraynak, the only opinion in the record at that time finding pneumoconiosis arising out of his coal mine employment, because this physician relied on seventeen years of coal mine employment whereas the administrative law judge found three and three-quarter years. Director's Exhibit 59; see *Sellards, supra*; *Addison, supra*; *Fitch, supra*; *Gouge, supra*. Therefore, inasmuch as the administrative law judge provided valid reasons for discrediting the opinions of Drs. Kraynak and Kruk, we affirm the administrative law judge's Section 718.203(c) finding. See *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); see also *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

REGINA C. McGRANERY
Administrative Appeals Judge